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74-5968

IN THE SUPREME COURT OF
THE UNITED STATES
1974 TERM

JOHN A. GEDERS,

Petitioner,

v.

UNITED STATES OF AMERICA

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IN THE SUPREME COURT OF
THE UNITED STATES

1975 TERM

No. A-562

JOHN A. GEDERS,

Petitioner,

v.

UNITED STATES OF AMERICA

Petition For a Writ of Certiorari
To The United States Court of
Appeals For the Fifth Circuit

The Petitioner, John A. Geders, prays that a Writ of Certiorari issue to review the judgment/opinion of the United States Court of Appeals For The Fifth Circuit entered on October 7, 1974 and re-affirmed on December 6, 1974 following denial of Petition For Re-hearing.

OPINION BELOW

The opinion of the United States Court of Appeals For The Fifth Circuit, as yet unreported, appears at Appendix A, infra, said opinion of which affirmed the judgment of the United States District Court, Middle District of Florida, Tampa Division.

JURISDICTION

The order or judgment of the United States Court of Appeals For The Fifth Circuit was entered on October 7, 1974. (See Appendix Exhibit A, infra.) Application For Extension Of Time was timely filed with the Supreme Court of the United States and an Order Extending Time To File Petition For Writ of Certiorari in this matter was signed by the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States on January 9, 1975. The said Order Extending Time To File Petition For Writ of Certiorari ordered the time for filing a Petition For Writ of Certiorari in the above-styled cause extended to and including February 4, 1975. This Petition For Writ of Certiorari was filed on February 4, 1975, together with Motion For Leave To Proceed In Forma Pauperis supported by Petitioner's Affidavit of Insolvency and Request For Leave To Proceed In Forma Pauperis. The jurisdiction of this Court is involved under 21 U.S.C., Section 952 and 18 U.S.C., Section 371.

QUESTIONS PRESENTED FOR REVIEW

Point One(I)

DID THE COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STAGE OF THE TRIAL DEPRIVE DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL?

Point Two(II)

DID THE COURT COMMIT PREJUDICIAL ERROR BY ALLOWING GOVERNMENT WITNESS, CHARLES HUDSON, TO OFFER UNCORROBORATED HEARSAY TESTIMONY, AFTER DEFENDANT GEDERS HAD RESTED, THAT HE HAD CONDUCTED AN INVESTIGATION CONCERNING THE DEFENDANT GEDERS, HAD TALKED TO CONFIDENTIAL INFORMERS AND EXAMINED INTELLIGENCE FILES AT THE HILLSBOROUGH COUNTY SHERIFF'S OFFICE AND HAD ALLEGEDLY LEARNED THAT DEFENDANT GEDERS HAD ENGAGED IN OTHER SMUGGLING ACTIVITIES DURING A TWO TO THREE YEAR PERIOD?

STATEMENT OF THE FACTS

John A. Geders and Michael J. Fink, Jr. were charged by Indictment with three violations of Federal law, to wit: Count I - Conspiracy to import approximately one thousand pounds of marijuana into the United States in violation of 21 U.S.C., Section 952(a) and 18 U.S.C., Section 371; Count II - Illegal importation of said marijuana into the United States; and Count III - Illegal possession of marijuana inviolation of 21 U.S.C., Section 841(a)(1). Both defendants were convicted on all three counts in the U.S. District Court, Middle District of Florida, Tampa Division, with each defendant receiving 3-year sentences on each count, to be served concurrently.

The Government alleged that Petitioner Geders, along with Fink, conspired with seven other individuals, to wit: Rufus Randolph Surles, Jr., James M. Mahoney, Randy Kilgore, Fred Fink, Sr.(father of Michael J. Fink), Steven Patrick, Tom Waddington(now deceased) and David Butler, to smuggle marijuana into this country by air from Colombia, South America, via Inagua, The Bahama Islands. According to the prosecution, the plot germinated in September of 1972 when Geders, Kilgore and Fink(Jr.) concluded that together they possessed the wherewithal to smuggle a large quantity of marijuana into this country. Geders allegedly agreed to provide a South American "contact" or drug supply while Fink(Jr.) promised to find financial backing for the venture. Kilgore assured the others that he would make arrangements with a knowledgeable and trustworthy pilot who could be able and willing to fly the cargo of drugs into the United States undetected.

Fink(Jr.) allegedly introduced Mahoney and Waddington to the scheme and they agreed to provide the necessary capital. After several false starts apparently, Kilgore found Butler, a pilot with access to a

Piper Aztec aircraft, who was willing to make the trip to Colombia for a $10,000.00 fee plus expenses and fifty pounds of marijuana. Additional conspirators apparently appeared including Surles, who agreed to provide a camper truck into which the marijuana was to be transferred upon the plane landing. Patrick agreed to drive the camper truck.

On November 26, 1972 Butler, Geders, and Mahoney boarded Butler's rented aircraft and took off for Colombia, South America. On the return trip, after stopping at Inagua, The Bahamas Islands, the plane landed at the pre-arranged location near to Tampa, Florida. The marijuana was transferred from the aircraft to the camper truck, which began its departure from the landing site accompanied by Kilgore and Fink(Jr.) in a second vehicle.

At this point Federal agents, who had earlier been informed by the plane's pilot, Butler, of the entire undertaking, closed in on the defendants, at which point the entire amount of illegally imported marijuana was recovered, except fifty pounds, which was kept by the pilot as part of his consideration for making the trip (and presumably, although incredibly) for working with the Government as an undercover (double) agent. In addition, the United States Customs Service agreed to permit Butler to retain the generous fee paid to him by the other conspirators.

The trial of the conspirators began on October 9, 1973. Prior to this date, Kilgore and Patrick pleaded "guilty" to a single conspiracy count and agreed to testify for the prosecution. Although Butler was indicted, along with the others, the Government later moved to dismiss the charges against him and the Court granted the motion.

As his primary defense at trial, the Petitioner Geders argued that he had been entrapped by Butler, the Government informer, contending that not only did Butler assist him in furthering the importation scheme but actually induced him to commit the crime, while serving as a Government informer, if not an agent. Petitioner Geders further testified that when the aircraft had alighted at Inagua on the way back to the United States, and being tipped that Butler was suspected of working with law enforcement, that he (Geders) attempted to persuade Butler to dump the marijuana into the sea, but that Butler would not permit such an unloading of the contraband until the designated rendezvous point had been reached.

On the other hand, the Government insisted that Butler had, at all times, merely assisted a plot which had begun before he entered the picture, and that anything he did which appeared to further the conspiracy was done to gain the confidence of the conspirators.

During the trial, the Government in rebuttal, in an effort to establish the absence of entrapment, introduced uncorroborated hearsay testimony regarding Petitioner Geders' alleged predisposition to engage in similar illegal activities as those with which he was charged and convicted in the case sub judice, all of which became the first of two major questions of law to be reviewed by the appropriate appellate courts.

In addition, on appeal, Petitioner Geders contended that an order of the trial court placed him incommunicado with his attorney of record for a 16-hour period, effectively denying his Sixth Amendment right to counsel during the trial proceeding.

STATEMENT OF THE CASE

Petitioner, John A. Geders, was charged and convicted on all three counts of a Grand Jury indictment charging him with:

(a) Conspiring to import approximately one thousand pounds of marijuana into the United States, in violation of 21 U.S.C., Section 952(a) and 18 U.S.C., Section 371.

(b) Illegal importation of said marijuana into the United States; and

(c) Possession of marijuana in violation of 21 U.S. C., Section 841(a)(1).

Order, judgment and sentence were duly entered and imposed in this cause by the Honorable Ben Krentzman, Senior Judge of the United States District Court, Middle District of Florida, Tampa Division, in Case No. 73-69-Cr-T-K.

The Petitioner, John A. Geders, thereafter timely filed his Notice of Appeal and the aforesaid Order, Judgment and Sentence were taken on appeal to the United States Court of Appeals For The Fifth Circuit in the following styled case:

Michael J. Fink and
John A. Geders,
Appellants,
v.
United States of America,
Appellee.

Case No. 73-3966

On October 7, 1974 the United States Court of Appeals For The Fifth Circuit entered its opinion and judgment affirming the judgment of the aforementioned United States District Court For The Middle District of Florida, Tampa Division. (A copy of said opinion and a copy of said judgment of the United States Court of Appeals For The Fifth Circuit are attached herewith and incorporated herein as Appendix Exhibits A and B, respectively.)

Petition For Re-hearing was thereafter timely filed on behalf of the Petitioner herein, John A. Geders,with the Fifth Circuit entering its Order Denying Petition For Re-hearing on December 6, 1974. (A copy of the Order Denying Petition For Re-hearing is attached herewith and incorporated herein as Appendix Exhibit C.)

Subsequently, following Petitioner Geders' Motions, the Fifth Circuit handed down its recall and stay of its earlier judgment previously issued as mandate pending the timely filing and disposition of a Petition For Writ of Certiorari to this Honorable Court, with that appellate court further ordering the reinstatement of Petitioner Geders' earlier appeal bond. (A copy of said Order is attached herewith and is incorporated herein as Appendix Exhibit D.)

Application For Extension Of Time Within Which To File Petition For Writ Of Certiorari was thereafter timely filed on behalf of Petitioner Geders in the Supreme Court of the United States. On January 9, 1975 this Honorable Court entered its Order Extending Time To File Petition For Writ Of Certiorari up to and including February 4, 1975.

The Petition For Writ of Certiorari in this cause prays therefore that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals For The Fifth Circuit rendered as aforementioned on October 7, 1974, along with the Order Denying Motion For Re-hearing on December 6, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

As to Point One(I): Sixth Amendment, United States Constitution; Right to counsel in criminal proceeding.

As to Point Two(II): Fifth Amendment, United States Constitution; Deprivation of due process of law.

IN THE SUPREME COURT OF
THE UNITED STATES

1975 TERM

JOHN A. GEDERS, Petitioner,	:	CASE NO. 73-3966
vs.	:	
UNITED STATES OF AMERICA, Respondent.	:	

PETITION FOR WRIT OF CERTIORARI

Petitioner, JOHN A. GEDERS, through his undersigned attorneys, pursuant to Rule 23, Revised Rules, Supreme Court of the United States, petitions this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit to review that Court's affirmation of his conviction in U.S. District Court, Middle District of Florida, Tampa Division, and as grounds therefor would show unto the Court the following as questions of law:

POINT ONE (I)

DID THE COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STATE OF THE TRIAL DEPRIVE DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL?

It would appear that trial court may not have fully apprehended the import of its Order to Defendant Geders vis-a-vis prohibited contact with or access to his attorney during a sixteen hour recess between direct examination and cross-examination of Geders. It should be well noted that while the impression was created by the prosecuting office, in its brief on appeal, that Geders was only ordered by Judge Krentzman to not consult with his attorney regarding the offering of testimony, IN FACT, the trial judge made the Defendant and his counsel totally INCOMMUNICADO to one another for a sixteen-hour period during the trial itself.

The tone for the incommunicado order set by Prosecutor Blasingame should be carefully considered (T-1149):

MR. BLASINGAME:

"Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys-or anyone--about this case at all?"

THE COURT: (T-1153)

"Well, I don't have any questions, Mr. Rinehart, about what you--I think you are a disciplined man. I think you are trained in the law . . . but your client, as far as I know, has not had any legal training . . . and I don't know that he is subject to that same instruction--that he would understand it.

"I think he would understand it if I told him just not to talk to you; and I just think that it is better that he not talk to you about anything." (emphasis added)

Finally, the trial court's question to counsel for Defendant Geders on the following morning (when the trial was resumed) should be carefully noted in determining Judge Krentzman's intent regarding his order to Defendant Geders: (T-1164)

THE COURT

"You have not talked with him (the Defendant Geders) of course, have you?"

MR. RINEHART:

"No, I haven't."

The Fifth Circuit had apparently not previously addressed itself to this particular constitutional question and was forced to align itself with either the Second or Third Circuit, which Circuits hold virtually diametrically opposite decisions on the question, to wit:

The Third Circuit held in U.S. v. Venuto, 182 F.2d 519 (3rd Cir. 1950), as follows:

" . . . To deprive an accused Defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the Defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing a restriction of silence between the accused and counsel during a trial recess. We reject the Government contention that Defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a Federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client, but, as stated in Glasser v. United States, supra, 315 U.S. at page 467:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice

calculations as to the amount of prejudice arising from its denial." By restricting the right of consultation between this Defendant and his counsel during court recess, Defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the Constitution. His objection on this ground and his motion for mis-trial directed to the trial court were well founded. Accordingly, the conviction must be reversed and a new trial granted."

In contrast, the Second Circuit held in U.S. v. Leighton, 386 F. 2d 322 (2nd Cir. 1967) as follows:

"...Leighton's (the Defendants) objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to counsel....at no time during, before, or after the recess did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the Judge's ruling, but the objection appears to be an attempt to sow reversible error into the record rather than an effort to indicate to the trial judge that the attorney and client had something to discuss."

Leighton's reliance upon U.S. v. Venuto, 182 F. 2d 519 (3Cir. 1950), is misplaced....its (the ruling forbidding attorney/client communication)application to the Defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right of effective assistance of counsel, and are convinced that there was none."

The Fifth Circuit aligned itself with the Second Circuit, notwithstanding two United States Supreme Court cases, which can reasonably be interpreted to state that a Defendant's being denied access to counsel during a trial proceeding is, per se, a reversible deprivation of right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution, without a showing of prejudice, to wit:

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 at Page 467:

"...To determine the precise degree of prejudice substained by Glasser as a result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Earlier in the opinion at Page 467, the Supreme Court stated:

"There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected...."

Finally in Chapman v. State of California, 386 U.S. 125, 87 S. Ct 824, Mr. Justice Stewart, concurring in the result, stated at page 837:

"In devising a harmless-error rule for violations of federal constitutional rights, both the Court and the dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were "harmless." Illustrations of the principle are legion...

"... when a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. "Glasser v. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L. Ed 680."

In reading Glasser v. U.S. and Justice Stewarts' concurring opinion in Chapman v. State of California it would appear that the sixteen-hour incommunicado order by the trial court, regarding Defendant Geders' right to the assistance of his counsel during his trial is a per se deprivation of the Defendant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution and the decision by the Fifth Circuit apparently to "indulge in nice calculations as to the amount of prejudice arising from its denial" (during a sixteen-hour period) is inconsistent with this precious constitutional right guaranteed to all federal defendants in criminal trial proceedings.

At the very least, a conflict of Circuit Court rulings on this question of law would appear to provide a basis for this Honorable Court to issue its Writ of Certiorari for the purpose of resolving this conflict of Circuit Court law on the question by review and decision.

POINT TWO (II)

Petitioner Geders further respectfully urges this Honorable Court to review the Fifth Circuit ruling with respect to the following question of law.

DID THE COURT COMMIT PREJUDICIAL ERROR BY ALLOWING GOVERNMENT WITNESS, CHARLES HUDSON, TO OFFER UNCORROBORATED HEARSAY TESTIMONY AFTER DEFENDANT RESTED, THAT HE HAD CONDUCTED AN INVESTIGATION CONCERNING THE DEFENDANT GEDERS, HAD TALKED TO CONFIDENTIAL INFORMANTS AND EXAMINED INTELLIGENCE FILES AT THE HILLSBOROUGH COUNTY SHERIFF'S OFFICE AND HAD LEARNED THAT THE DEFENDANT GEDERS HAD ALLEGEDLY ENGAGED IN OTHER SMUGGLING ACTIVITIES DURING A TWO TO THREE YEAR PERIOD?

The Fifth Circuit in dealing with this question appears to ignore any consideration of the rulings and rationale of Hansford v. United States of America, 303 F 2d 219(D. Of C. Cir. 1962); United States of America v. Johnston, 426 F.2d 112(7th Cir. 1970); and United States of America v. Ambrose, 483 F.2d 742(6th Cir. 1973), regarding the question of uncorroborated hearsay testimony offered by a Government witness during rebuttal to allegedly establish pre-disposition of the defendant to commit the crimes charged.

Petitioner agrees that once the defense of entrapment is raised it is permissible for the Goverament to show in rebuttal that the defendant was a person pre-disposed to commit the offense charged in the instant proceeding.

However, Petitioner further contends that the Fifth Circuit, in its ruling on this question, erroneously applied the standard as to character reputation testimony enunciated in Michelson v. United States, 335 U.S. 469 (1948), rather than applying the law of the three Circuits above cited.

The defense of entrapment and the issue of limitations and requirements imposed on the Government relative to rebuttal testimony probative of defendant's pre-disposition to commit the offense with which defendant is charged is in no way present nor dealt with in the Michelson case.

In the matter sub judice, however, the defense of entrapment was clearly raised, and Agent Hudson was called as a rebuttal witness on behalf of the Government to testify for the limited purpose of matters relating to defendant's alleged pre-disposition to commit the crimes charged against the defendant.

Petitioner, therefore, contends that the rebuttal testimony of Agent Hudson was inadmissible in that it clearly and completely failed to meet the unequivocal requisite standards prior to offering such testimony, as set forth in Hansford, supra; Johnston, supra; and Ambrose, supra.

Petitioner respectfully submits that it is not sufficient, therefore, to find the rebuttal testimony of Agent Hudson, pursuant to the decision and rationale of Michelson. The limitations and requirements of rebuttal testimony relative to the pre-disposition factor countering an entrapment defense goes well beyond the modest standards laid down in the presentation of ordinary character reputation testimony in non-entrapment cases.

In the Hansford case, the United States Court of Appeals, District of Columbia Circuit, ruled that testimony by a police officer in rebutting a claim of entrapment in the sale of narcotics, as to prior alleged sales made by defendant which the officer claimed he had witnessed, was not admissible and prejudicial when the officer's testimony was not corrorobrated by production of the alleged contemporaneous police report nor otherwise substantially corroborated.

In its opinion, the Court dealing with the uncorroborated rebuttal pre-disposition stated:

> "In these circumstances, the defendant had no opportunity to prepare to defend against this other charge and no means of combatting it, save by his own unsupported testimony in denial of the officer's testimony."

In United States v. Johnson, supra, the United States Court of Appeals, Seventh Circuit, adopted Hansford, supra, and in effect found that Hansford was completely consistent with the decisions arrived at in Sorrells v. United States, 287 U.S. 435 (1932) and Sherman v. United States, 356 U.S. 369 (1958).

Further, in the Ambrose case, supra, the Government had called agents to testify that the defendant was a vendor of narcotics, yet none of them knew this of their own personal knowledge. It appeared this information had been obtained from telephone callers and it was not shown that those callers either knew the appellee personally or even from his locality, and it was not indicated that the callers' information was obtained first hand.

The essence of the Ambrose ruling is that such rebuttal pre-disposition testimony was so indefinite that it could give the defendant no opportunity to refute it and concluded that the admission of such uncorroborated, unreliable hearsay evidence allegedly showing pre-disposition of the appellant was highly prejudicial error.

The Court in the Ambrose case quotes Judge Hartigan in Whiting v. United States, 296 F.2d 512, 516-517 (1st Cir. 1961). In the Whiting case the Government attempted to present pre-disposition testimony relating to the defendant by calling to the stand certain rebuttal witnesses who presented hearsay testimony. The Court in Whiting reversed the judgment of conviction and held that the uncorroborated hearsay evidence introduced by the Government was impermissibly unreliable and afforded the defendant no fair opportunity to refute it, the fourth Circuit apparently to adopt this rationale and rule of law.

At the very least, a conflict of Circuit Court rulings on this question of law would appear to provide a basis for this Honorable Court to issue its Writ of Certiorari for the purpose of resolving this conflict by review and decision.

Conclusion And Prayer

Because of the obvious conflict between the Circuit Courts of Appeals on the two questions of law presented by Petitioner Geders and the legal significance of each question presented this Honorable Court has jurisdiction to issue its Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, to review these two questions of law in the cause herein, for which Petitioner respectfully prays.

Respectfully submitted:

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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Petition For Writ of Certiorari has been furnished to John L. Briggs, United States Attorney's Office, U. S. Post Office Building, Tampa, Florida by regular United States Postal Service this 4th day of February, 1975.

Seymour L. Honig

Richard H. McInnis

APPENDIX A